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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 704

IRENE MORGAN
Appellant

vs.

COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

REPLY BRIEF OF APPELLANT

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AUTHORITY FOR FILING

Pursuant to the privilege granted by paragraph 5 of Rule 27 of this Court, appellant, before the call of this case for argument, files this Reply Brief addressed to arguments advanced in the Brief of Appellee.

ARGUMENT

I

The "Police Power" Argument of Appellee Is Predicated Upon an Erroneous Analysis of the Present Problem

Relying upon cases which have permitted states to impose racial segregation of passengers in intrastate commerce, the Commonwealth has argued in Point III of its brief that the questioned statute of Virginia is a "reasonable, proper and valid exercise of the police power." In so

arguing the Commonwealth has failed to recognize the essential difference between the considerations involved in determining whether a permissible regulation or classification has been made under the equal protection clause of the 14th Amendment in a matter of merely local significance and the considerations involved when a state is charged with invading the exclusive jurisdiction of the nation under the commerce clause. These two situations present distinct problems and invoke different criteria of judgment. In one case the question is whether government may impose the regulation at all. In the other the inquiry is whether the state must leave the matter for national determination.

In deciding what a state may do under the 14th Amendment in a situation of only local significance, this Court recognizes that its function is narrowly limited. Judicial judgment as to the utility or wisdom of the state's action is not involved. The state's action may appear provincial, ill considered or even hurtful to the community, yet be sustained. The national courts intervene only to supply the minimum corrective necessary to secure the individual against the injurious effect of regulations, classifications or procedures which, even from the local view, must seem arbitrary, outrageous and grossly unfair to all reasonable persons. Beyond this the 14th Amendment does not restrict the vagaries of local government in the areas where regulation, if permitted at all, must be by the state.

The judicial function is vastly different where the state is charged with invading an area of exclusive national jurisdiction under the negative implications of the commerce clause. If, as in the instant case, a state lays hands upon commerce moving among the states, it has entered a field of primary national concern. The dominance of the nation in this area is clear.[1] Congress may act to the exclusion of

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[1] "The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to affect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power.'" Southern Pacific Co. v. Arizona, 325 U. S. 761, 65 Sup. Ct. 1515, 1525.

the states and, without action by Congress, the power of the several states is drastically limited by the negative implications of the commerce clause. The state has no such freedom to act in accord with local notions as is permitted under the 14th Amendment. Thus in the circumstances of any given case this Court is called upon to determine whether, in the light of the dominant national interest in free commerce, local interference is to be tolerated. In this process the Court cannot escape an independent evaluation of the purpose, significance and utility of the state regulation. In no other way can it be decided whether interstate commerce may reasonably be required to bear the burden which the state seeks to impose upon it. If it appears to the Court that no significant protection of legitimate and important local interests is to be achieved by the regulation, then clearly there is no justification for the imposition upon interstate commerce. It is only when the Court finds that the probable protection to the local community is so substantial in relation to the burden imposed upon commerce as to make that imposition unobjectionable, that the local regulation of a field of national interest and authority may be permitted.

In brief, the determination of "reasonableness" under the 14th Amendment involves only the protection of the individual against the most clearly arbitrary and intolerable action of government. But, in cases arising under the commerce clause, judgment must be exercised and state impositions evaluated in the light of the relative functions of state and nation in an area where admittedly the nation is dominant.

This basic distinction between the considerations involved in the application of the 14th Amendment to matters of only local significance and in the application of the commerce clause to preclude the states from infringing national jurisdiction has repeatedly been recognized by this Court. Its

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In Public Utilities Comm. v. Attleboro Steam & Electric Co., 273 U. S. 83, a state regulation of interstate power rates was invalidated despite a clear showing that the rate was reasonable and that substantial local interests would be jeopardized by a lower rate. Cf. Shafer v. Farmers

most striking exemplification occurs where in successive cases a single statute is approved as a local regulation consistent with the 14th Amendment, but disapproved under the commerce clause when applied to importations from other states. Such was the history in this Court of both the New York milk control law and the Pennsylvania statute prohibiting the sale of oleomargarine.[3]

If the foregoing analysis is correct, the "police power" argument of the Commonwealth is beside the point. The considerations developed in Point II of appellant's brief are decisive in placing regulations concerning racial segregation in interstate commerce within the area of exclusive national power.

A. The Involvement of Highway Travel Has No Special Significance Here

The Commonwealth has sought to strengthen its "police power" argument by the contention that the pronouncements of this Court seem to recognize a greater authority of the state over vehicles moving upon its highways than over railway trains.

It is true that this Court has recognized certain legitimate concerns of the state with highways which do not extend to railways. Thus the preservation and maintenance of highways built by the state is a matter of state concern to a greater degree than is the preservation and maintenance of privately owned railways. Similarly, there are special problems of safety characteristic of highway travel by a

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Grain Co., 268 U. S. 189. As recently as Nippert v. City of Richmond, No. 72, October Term, 1945, decided February 25, 1946, this Court pointed out that the question of reasonableness in the due process or "jurisdictional" sense—there the fairness of a tax of only local factors should be considered—differs from the question to be decided when there are "other considerations of constitutional policy having reference to the substantial effects, actual and potential, of the particular tax in suppressing or burdening unduly the commerce." See also Leisy v. Hardin, 135 U. S. 100, 121-124.

[3] With Baldwin v. Seelig, Inc., 294 U. S. 511, contrast Nebbia v. New York, 291 U. S. 502, and with Schollenberger v. Pennsylvania, 171 U. S. 1, contrast Powell v. Pennsylvania, 127 U. S. 678.

miscellany of vehicles which do not arise in connection with trains whose movement is restricted to fixed rails and is usually controlled by a single operating agency. In these matters, peculiar to highway travel, this Court has from time to time concluded that regulations obviously appropriate to the protection of the state's special interests may be imposed even though a burden upon interstate commerce may result. But with reference to a subject matter, here the racial segregation of passengers, as to which the highest court of the state has said in this very case [4] that a policy of segregation is not peculiar to highway travel but applicable equally to travel by public carriers moving on railways, waterways or elsewhere, no special significance is attributable to the fact that a particular case arises out of highway travel.

Cases involving the relation of the commerce clause to various local regulations affecting highway travel show that the foregoing analysis is consistent with the adjudications of this Court.

Thus, while the state's interest in minimizing dangerous congestion peculiar to highway travel may justify its refusal to permit a motor vehicle carrier to operate over a particular state highway already overburdened with traffic,[5] the authority of the state is exceeded by a similar denial predicated not upon safety factors peculiar to highways, but rather upon its notions of the adequacy of service.[6] Likewise, while the state's interest in minimizing local loss from all too frequent highway collisions may sustain a statute requiring an interstate motor carrier to carry insurance or furnish bond to indemnify persons damaged as a result of its operations on state highways,[7] its legitimate interests are exceeded by a statute which requires the carrier to

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[4] See Record page 60.

[5] Bradley v. Public Utilities Commission of Ohio, 289 U. S. 92.

[6] Buck v. Kuykendall, 267 U. S. 307; Bush Company v. Maloy, 267 U. S. 317.

[7] Hicklin v. Coney, 290 U. S. 169; Continental Baking Co. v. Woodring, 286 U. S. 352.

afford indemnity to the interstate shipper.[8] Similarly, state laws imposing fees upon those using its highways for purposes of interstate commerce with a view to raising funds to defray the cost of maintenance, supervision and compensation for their use, are an appropriate exercise of state power,[9] but those exacting fees in excess of the amount necessary for such purposes go beyond the special local interest in maintenance and are invalid.[10]

In brief, the fact that commerce moves over state highways rather than on railways or elsewhere becomes important only where the interest which particular legislation seeks to subserve is peculiar to highways. No such consideration is involved where the issue is the power of the state to impose upon interstate commerce a fixed policy with respect to passenger seating, applicable alike to public carriers by rail, water or highway.

II

The Challenge to Appellant's Right to Contest the Constitutionality of the Statute Under Which She Was Convicted Is Groundless

The position of the Commonwealth that appellant is without sufficient interest to assert the unconstitutionality of the statute is predicated upon the erroneous view that she is asserting a right of the carrier. But appellant's position is that the statute burdens the commerce in which she was engaged, and of which she was a part, and was applied in such manner as to injure her. Appellant champions no interests other than her own, although in this case, as in others, judicial inquiry into the burden upon commerce goes beyond the impact of the questioned regulation upon the litigants.

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[8] Michigan Public Utilities Commission v. Duke, 266 U. S. 570.

[9] Hendrick v. Maryland, 235 U. S. 610; Kane v. New Jerseys, 242 U. S. 160; Morf v. Bingaman, 298 U. S. 407.

[10] Sprout v. South Bend, 277 U. S. 163; Interstate Transit v. Lindsey, 283 U. S. 183; Ingels v. Morf, 300 U. S. 290.

In raising the invalidity of the law appellant is not officious or an intermeddler. At the time the statute was enforced against her, appellant was making an interstate journey and in so doing was exercising her privilege to move freely from one state to another. Whether her right so to do has its source in the commerce clause, the 14th Amendment or the inherent character of Federal citizenship, its existence is freely conceded.[11] By the enforcement of the law her trip was interrupted and under it she was prosecuted. Unless she is afforded protection at the hands of this Court, she will be penalized in accordance with its provisions. If the law stands, the injury to appellant is plain.

It is now settled that the transportation of persons across state lines is interstate commerce.[12] Like the person whose goods are being transported in interstate commerce,[13] the passenger being transported therein is, with respect to such transportation, as much engaged in interstate commerce as is the carrier who furnishes the means of transportation.[14] In the freedom of that commerce from any unconstitutional burden appellant had a direct interest, and the decided cases have uniformly recognized her standing to complain.[15]

The basic fallacy in the Commonwealth's argument is the assumption that the statute burdens only the carrier. See

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[11] Crandall v. Nevada, 6 Wall. 35; see also Twining v. New Jersey, 211 U. S. 78; Williams v. Fears, 179 U. S. 270.

[12] Edwards v. California, 314 U. S. 160; United States v. Hill, 248 U. S. 420; Caminetti v. United States, 242 U. S. 470; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204. These cases also show that the fact that the transportation is noncommercial in character is immaterial.

[13] Savage v. Jones, 225 U. S. 501; Leisy v. Hardin, 135 U. S. 100; Bowman v. Chicago & Northwestern Ry. Co., 125 U. S. 465

[14] Covington & C. Bridge Co. v. Kentucky, supra, at 218-219. See also the Federal Fugitive Felon Act, May 18, 1934, c. 302, 48 Stat. 782, 18 U. S. C. Sec. 408e.

[15] In many of the cases wherein the unconstitutionality of legislation of the kind involved in this case was established, the issue was raised by the passenger. Washington, B. & A. Elec. R. Co. v. Waller, 53 App. D. C. 200, 289 F. 598; McCabe v. Atchison, T. & S. F. Ry. Co., 186 F. 966 (C. C. A. 8th); Anderson v. Louisville & N. R. Co., 62 F. 46 (C. C. Ky.); State v. Jenkins, 124 Md. 376, 92 Atl. 773; Hart v. State, 100 Md. 595, 60 Atl. 457; Carrey v. Spencer, 36 N. Y. Supp. 886.

tion 5 of the Act, under which appellant was prosecuted, is directed solely against the passenger and seeks to control his conduct only. Moreover, the direct effect of the injunctions of the statute in terms addressed to the carrier and requiring him to segregate passengers extends to the passenger who is the victim and real object of the legislation. The carrier is by statutory compulsion merely the agency of the state to carry out an unconstitutional imposition. In such circumstances appellant may complain not only of those provisions of the law which specifically mention her, but also those which, by the simple expedient of compelling the carrier to act, accomplish and make mandatory an unconstitutional invasion of her legally protected interests.[16]

III

The Commonwealth Is Mistaken in Implying National Intent to Leave the Matter in Question to State Control

The brief of the Commonwealth suggests[17] that the failure of Congress to legislate upon the matter in controversy indicates a legislative intent that the states may so legislate.

There is no rational basis for such an inference. To the contrary, ever since *Hall v. DeCuir*, Congress must have understood that the states are without authority to regulate interstate commerce in the manner now attempted by Virginia. There is no occasion for legislation to accomplish that result. National legislation would be necessary only if Congress desired either to *give the states* the power denied them in *Hall v. DeCuir*, or to *take away from the carrier* the privilege of regulating the seating of passengers according to race.

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[16] Savage v. Jones, supra; Bowman v. Chicago & Northwestern Ry. Co., supra; Truax v. Raich, 239 U. S. 33; Buchanan v. Warley, 245 U. S. 60; Pierce v. Society of the Sisters, 268 U. S. 510.

[17] At pages 24-25.

Moreover, the one effort of Congress to regulate this matter occurred in the Civil Rights Acts.[18] The national policy against segregation in public places and upon public carriers was there stated in the clearest language. The persistence of such a policy as reflected by the Charter of the United Nations is mentioned in the conclusion of Appellant's original brief in this case. This Court, as recently as 1943, speaking through the Chief Justice, stated that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[19] And Mr. Justice Murphy, concurring in the case, expressed the same basic concept: "Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals."[20]

Thus both the action of Congress and the language of this Court make it clear that national policy is opposed to racial distinctions in areas of national dominance or concern.

CONCLUSION

Wherefore, it is respectfully submitted that the contentions of the Commonwealth are without merit and that, for the reasons stated in the appellant's original brief and in this reply brief, the judgment of the Supreme Court of Appeals of Virginia should be reversed.

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[18] 18 Stat. 335.
[19] See Hirabayashi v. United States, 320 U. S. 81, 100.
[20] *Id.* at 110.